

# Agenda

## Item #7



STATE OF MAINE  
COMMISSION ON GOVERNMENTAL ETHICS  
AND ELECTION PRACTICES  
135 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0135

To: Commission Members and Counsel

From: Jonathan Wayne, Executive Director

Date: October 22, 2007

Re: Confidentiality of Legislative Ethics Complaints

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The Legislature is conducting an extensive review of all exceptions to the Freedom of Access Laws. It will examine laws that require certain records and agency proceedings to be kept confidential. In the 2008 legislative session, the Legislature will consider the confidentiality provisions that apply to complaints of legislative ethics violations submitted to the Ethics Commission.

The Right to Know Advisory Committee is a permanent committee that provides advice to the Legislature about Maine's Freedom of Access Laws. It has submitted a questionnaire to the Ethics Commission asking whether the Commission supports or opposes continuing the confidentiality of ethics complaints.

Under 1 M.R.S.A. § 1013(2)(B), the Maine Commission on Governmental Ethics and Election Practices is authorized to receive and consider complaints regarding conflicts of interest by Legislators. Conflicts of interest include influencing legislation that would provide a unique personal benefit to a Legislator and other circumstances such as unduly influencing an administrative agency or obtaining a special privilege due to membership in the Legislature. (1 M.R.S.A. § 1014, attached). The Commission's procedures for considering ethics complaints are set forth in 1 M.R.S.A. § 1013, also attached.

#### **Background on Legislative Ethics Complaints**

Few complaints concerning legislative ethics are filed with the Ethics Commission. Recently, one or two complaints have been filed per year, on average. The Commission has received no legislative ethics complaints this year.

The Commission is limited in its jurisdiction to hear complaints about legislative ethics. It may only consider complaints "dealing with alleged conflicts of interest related to the current Legislature" and the statute only contemplates that complaints will be filed by Legislators, not members of the general public. (1 M.R.S.A. § 1013(2)(B)). The Commission does have authority, however, to pursue conflicts of interest complaints "on its own motion," pursuant to 1 M.R.S.A. § 1013(1)(B), and Chapter 1 of the

Commission's rules includes a procedure for responding to complaints filed by others (i.e., non-legislators).

When a complaint is filed, the Commission must provide a copy of the complaint to the Legislator. The Commission must also conduct an investigation and hold a hearing if it deems necessary. The Legislator also has a right to request a hearing. (1 M.R.S.A. § 1013(2)(B)) If a hearing is held, the Legislator has the right to call witnesses and to cross-examine witnesses. After the hearing, the Commission must issue findings of fact and an opinion to the legislative chamber of which the Legislator is a member. That chamber is authorized to take any action it believes is appropriate. The Commission is not authorized to take any punitive action against the Legislator. (1 M.R.S.A. § 1013(2)(D))

### **Current Confidentiality Provisions**

Under current law, two provisions require that legislative ethics complaints and related records be kept confidential:

**3. Confidentiality.** The subject of any investigation by the commission shall be informed promptly of the existence of the investigation and the nature of the charges or allegations. Otherwise, notwithstanding chapter 13 [the Freedom of Access law], all complaints shall be confidential until the investigation is completed and a hearing ordered or until the nature of the investigation becomes public knowledge. Any person, except the subject of the investigation, who knowingly breaches the confidentiality of the investigation is guilty of a Class D crime. (1 M.R.S.A. § 1013(3))

**J.** The records of the commission and all information received by the commission acting under this subchapter in the course of its investigation and conduct of its affairs shall be confidential, except that Legislators' statements of sources of income, evidence or information disclosed at public hearings, the commission's findings of fact and its opinions and guidelines are public records. (1 M.R.S.A. § 1013(2)(J))

### **Recent Practice**

In 2006, the staff recommended that under § 1013, the following steps be taken after a complaint is filed:

Step A	A complaint alleging a conflict of interest is filed with the Commission.	Confidential
Step B	The Commission staff provides a copy of the complaint to the Legislator, and the staff requests a preliminary written response on the issue of whether	Confidential

	the Commission should hold a hearing and whether an ethics violation occurred.	
Step C	The staff may conduct preliminary fact-gathering.	Confidential
Step D	Legislator responds to the staff request.	Confidential
Step E	The Commission holds a meeting in executive session to decide whether to hold a public hearing to consider the complaint. If the Commission decides not to hold a hearing, the matter would remain confidential permanently.	Confidential
Step F	The Commission holds a public hearing and conducts any further investigation it deems necessary.	Public
Step G	The Commission issues findings of fact and opinion.	Public

Our interpretation of § 1013(3) is that Steps A - E should be confidential. If the Commission decides to hold a hearing, the hearing would be public, including all records presented at the hearing even if they were generated as part of Steps A - E.

### **Staff Recommendation**

The staff recommends that the Commission support continuing the public records exception for legislative ethics complaints, for a number of reasons:

- The confidential screening process is designed to strike a balance between identifying conflicts of interest and not creating a forum that would encourage complaints that are uninformed or ill-motivated. Under the design of § 1013, complaints that present a genuine question of a conflict of interest will receive a public hearing. If the complaint is groundless and is based on a poor understanding of the law, bad faith or political motivations, the complaint will be dismissed and will not be heard publicly.
- The legislative ethics law has been under scrutiny in the past few years, which is appropriate. The law should be reviewed to ensure that meritorious complaints will be heard by the Commission in public. Nevertheless, it is a fact of life that some portion of complaints about legislative ethics received by the Commission may not have merit and may be motivated by politics or even bad faith. Groundless complaints, if made public, can irreparably damage a Legislator's public reputation and standing within state government.
- The confidential screening process is not unlike private screening processes in other ethics enforcement schemes. For example, under the grievance process of the Maine Board of Bar Overseers for reviewing allegations of attorney misconduct, many complaints that lack merit are dismissed without public hearings. Public hearings are held for misconduct cases that meet certain tests for merit.

## **Recommended Changes to the Confidentiality Provisions**

In the autumn of 2006, I was a non-voting member of the Presiding Officers' Advisory Committee on Legislative Ethics. The panel included members with a wide spectrum of viewpoints on the current ethics laws, including some reform-minded members who believed the laws need to be improved. The advisory committee made a number of significant statutory proposals (*e.g.*, allowing members of the public to file ethics complaints; broadening the definition of a conflict of interest), but did not suggest ending the confidentiality of legislative ethics complaints.

The advisory committee recommended certain changes to the confidentiality provisions in § 1013(3). The changes were intended to clarify the current process, but not to alter it significantly. These changes were part of a larger legislative ethics bill, L.D. 1008, which was considered earlier this year by the Legislature. The Legislature rejected the proposed changes and instead required the Commission to provide a report on the history of legislative ethics complaints and an assessment of the current process for considering complaints. This report is due on February 15, 2008.

The Commission staff believes the attached changes, which are identical to those proposed in L.D. 1008 by the advisory committee,<sup>1</sup> would improve the process and would be acceptable to many Legislators and reform advocates. We suggest that the Commission recommend these changes to the Right to Know Advisory Committee for inclusion in its report to the Legislature.

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<sup>1</sup> The attached proposed changes differ from L.D. 1008 in one minor respect. The original bill referred to "a violation of legislative ethics," which was a defined term in the bill. The attached changes use the term "conflict of interest" to be consistent with the existing statute.

## Proposed Changes to Confidentiality Provisions in 1 M.R.S.A. § 1013

~~(2)(J).~~ The records of the commission and all information received by the commission acting under this subchapter in the course of its investigation and conduct of its affairs shall be confidential, except that Legislators' statements of sources of income, evidence or information disclosed at public hearings, the commission's findings of fact and its opinions and guidelines are public records.

**3. Confidentiality.** The subject of any investigation by the commission shall be informed promptly of the existence of the investigation and the nature of the charges or allegations. Otherwise, notwithstanding chapter 13, all complaints shall be confidential until the investigation is completed and a hearing ordered or until the nature of the investigation becomes public knowledge. Any person, except the subject of the investigation, who knowingly breaches the confidentiality of the investigation is guilty of a Class D crime.

**4. Confidentiality of records and proceedings relating to screening complaints alleging a violation of legislative ethics.** Notwithstanding chapter 13, a complaint alleging a conflict of interest is confidential and is not a public record until after the commission has voted pursuant to subsection 2, paragraph B to pursue the complaint, and a commission proceeding to determine whether to pursue a complaint must be conducted in executive session. If the commission does not vote to pursue the complaint, the complaint and records relating to the investigation of that complaint remain confidential and are not public records. This subsection does not prevent the commission from including general information about complaints in any report to the Legislature. Any person who knowingly breaches the confidentiality of a complaint investigation commits a Class D crime. This subsection does not prevent commission staff from disclosing information that is necessary to investigate a complaint.

**5. Confidentiality of records other than complaints.** Commission records other than conflict of interest complaints are governed by this subsection.

A. Investigative records relating to conflict of interest complaints that the commission has voted to pursue are confidential unless they are provided to commission members or otherwise distributed at a public hearing of the commission.

B. Legislators' statements of sources of income are public records.

C. Findings of fact and recommendations of the commission on complaints alleging a conflict of interest are public records.

D. Advisory opinions of the commission and requests for advisory opinions from the commission are public records, except as provided in subsection 2, paragraph H.

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## **Title 1: GENERAL PROVISIONS**

### **Chapter 25: GOVERNMENTAL ETHICS (HEADING: PL 1975, c. 621, §1 (new))**

#### **Subchapter 2: LEGISLATIVE ETHICS (HEADING: PL 1975, c. 621, §1 (new))**

### **§1013. Authority; procedures**

#### **1. Authority.** The commission shall have the authority:

A. To issue, on request of any Legislator on an issue involving himself, or on its own motion, advisory opinions and guidelines on problems or questions involving possible conflicts of interest in matters under consideration by, or pertaining to, the Legislature; [1975, c. 621, § 1 (new).]

B. To investigate complaints filed by Legislators, or on its own motion, alleging conflict of interest against any Legislator, to hold hearings thereon if the commission deems appropriate and to issue publicly findings of fact together with its opinion; and [1989, c. 561, §5 (amd).]

C. To administer the disclosure of sources of income by Legislators as required by this subchapter. [1975, c. 621, § 1 (new).]  
[1989, c. 561, §5 (amd).]

#### **2. Procedure.** The following procedures shall apply:

A. Requests for advisory opinions by members of the Legislature shall be filed with the commission in writing, signed by the Legislator requesting the opinion and shall contain such supporting data as the commission shall require. When preparing an advisory opinion on its own motion, the commission shall notify the Legislator concerned and allow him to provide additional information to the commission. In preparing an advisory opinion, either upon request or on its own motion, the commission may make such an investigation as it deems necessary. A copy of the commission's advisory opinion shall be sent to the Legislator concerned and to the presiding officer of the House of which the Legislator is a member; [1975, c. 621, § 1 (new).]

B. A Legislator making a complaint shall file the complaint under oath with the chairman. The complaint shall specify the facts of the alleged conflict of interest. The Legislator against whom a complaint is filed shall immediately be given a copy of the complaint and the name of the complainant. Only those complaints dealing with alleged conflicts of interest related to the current Legislature shall be considered by the commission. Upon a majority vote of the commission, the commission shall conduct such investigation and hold such hearings as it deems necessary. The commission shall issue its findings of fact together with its opinion regarding the alleged conflict of interest to the House of which the Legislator concerned is a member. That House may take whatever action it deems appropriate, in accordance with the Constitution of the State of Maine. [1975, c. 621, § 1 (new).]

C. When the conduct of a particular Legislator is under inquiry and a hearing is to be held, the Legislator shall be given written notification of the time and place at which the hearing is to be held. Such notification shall be given not less than 10 days prior to the date set for the hearing. [1975, c. 621, § 1 (new).]

D. The commission shall have the authority, through its chairman or any member designated by him, to administer oaths, subpoena witnesses and compel the production

of books, records, papers, documents, correspondence and other material and records which the committee deems relevant. The commission shall subpoena such witnesses as the complainant Legislator or the Legislator against whom the complaint has been filed may request to be subpoenaed. The State, its agencies and instrumentalities shall furnish to the commission any information, records or documents which the commission designates as being necessary for the exercise of its functions and duties. In the case of refusal of any person to obey an order or subpoena of the commission, the Superior Court, upon application of the commission, shall have jurisdiction and authority to require compliance with the order or subpoena. Any failure of any person to obey an order of the Superior Court may be punished by that court as a contempt thereof. [1975, c. 621, § 1 (new).]

E. Any person whose conduct is under inquiry shall be accorded due process and, if requested, the right to a hearing. All witnesses shall be subject to cross-examination.

Any person whose name is mentioned in an investigation or hearing and who believes that testimony has been given which adversely affects him shall have the right to testify, or at the discretion of the commission and under such circumstances as the commission shall determine to protect the rights of the Legislator under inquiry, to file a statement of facts under oath relating solely to the material relevant to the testimony of which he complains. Any witness at an investigation or hearing, subject to rules and regulations promulgated by the commission, shall be entitled to a copy of such testimony when the same becomes relevant to a criminal proceeding or subsequent investigation or hearings.

All witnesses shall be sworn. The commission may sequester witnesses as it deems necessary. The commission shall not be bound by the strict rules of evidence, but its findings and opinions must be based upon competent and substantial evidence.

Time periods and notices may be waived by agreement of the commission and the person whose conduct is under inquiry. [1975, c. 621, § 1 (new).]

F. If the commission concludes that it appears that a Legislator has violated a criminal law, a copy of its findings of fact, its opinion and such other information as may be appropriate shall be referred to the Attorney General. Any determination by the commission or by a House of the Legislature that a conflict of interest has occurred does not preclude any criminal action relating to the conflict which may be brought against the Legislator. [1975, c. 621, § 1 (new).]

G. If the commission determines that a complaint filed under oath is groundless and without foundation, or if the Legislator filing the complaint fails to appear at the hearing without being excused by the commission, the commission may order the complainant to pay to the Legislator against whom the complaint has been filed his costs of investigation and defense, including any reasonable attorney's fees. The complainant may appeal such an order to the House of which he is a member.

Such an order shall not preclude any other remedy available to the Legislator against whom the complaint has been filed, including, but not limited to, an action brought in Superior Court against the complainant for damages to his reputation. [1975, c. 621, § 1 (new).]

H. A copy of the commission's advisory opinions and guidelines, with such deletions and changes as the commission deems necessary to protect the identity of the person seeking the opinions, or others, shall be filed with the Clerk of the House. The clerk shall keep



them in a special binder and shall finally publish them in the Legislative Record. The commission may exempt an opinion or a part thereof from release, publication or inspection, if it deems such action appropriate for the protection of 3rd parties and makes available to the public an explanatory statement to that effect. [1975, c. 621, § 1 (new) .]

I. A copy of the commission's findings of fact and opinions regarding complaints against Legislators shall also be filed with the Clerk of the House. The clerk shall keep them in a special binder and shall finally publish them in the Legislative Record. [1975, c. 621, § 1 (new) .]

J. The records of the commission and all information received by the commission acting under this subchapter in the course of its investigation and conduct of its affairs shall be confidential, except that Legislators' statements of sources of income, evidence or information disclosed at public hearings, the commission's findings of fact and its opinions and guidelines are public records. [1977, c. 252, § 2 (amd) .]

K. When a Legislator has a question or problem of an emergency nature about a possible conflict of interest or an issue involving himself which arises during the course of legislative action, he may request an advisory opinion from the presiding officer of the legislative body of which he is a member. The presiding officer may, at his discretion, issue an advisory opinion, which shall be in accordance with the principles of this subchapter, which shall be in writing, and which shall be reported to the commission. The commission may then issue a further opinion on the matter. The presiding officer may refer such question or problem directly to the commission, which shall meet as soon as possible to consider the question or problem. [1975, c. 621, § 1 (new) .]  
[1977, c. 252, § 2 (amd) .]

**3. Confidentiality.** The subject of any investigation by the commission shall be informed promptly of the existence of the investigation and the nature of the charges or allegations. Otherwise, notwithstanding chapter 13, all complaints shall be confidential until the investigation is completed and a hearing ordered or until the nature of the investigation becomes public knowledge. Any person, except the subject of the investigation, who knowingly breaches the confidentiality of the investigation is guilty of a Class D crime. [1989, c. 561, §6 (new) .]

#### Section History:

PL 1975, Ch. 621, §1 (NEW) .  
PL 1977, Ch. 252, §2 (AMD) .  
PL 1989, Ch. 561, §5,6 (AMD) .

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[PDF, Word \(RTF\)](#)[Statute Search](#)[List of Titles](#)[Maine Law](#)[Disclaimer](#)[Revisor's Office](#)[Maine Legislature](#)**Title 1: GENERAL PROVISIONS****Chapter 25: GOVERNMENTAL ETHICS (HEADING: PL 1975, c. 621, §1 (new))****Subchapter 2: LEGISLATIVE ETHICS (HEADING: PL 1975, c. 621, §1 (new))****§1014. Conflict of interest**

**1. Situations involving conflict of interest.** A conflict of interest shall include the following:

A. Where a Legislator or a member of his immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise which would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation. [1975, c. 621, §1 (new) .]

B. Where a Legislator or a member of his immediate family accepts gifts, other than campaign contributions duly recorded as required by law, from persons affected by legislation or who have an interest in a business affected by proposed legislation, where it is known or reasonably should be known that the purpose of the donor in making the gift is to influence the Legislator in the performance of his official duties or vote, or is intended as a reward for action on his part. [1975, c. 621, §1 (new) .]

C. Receiving compensation or reimbursement not authorized by law for services, advice or assistance as a Legislator. [1975, c. 621, §1 (new) .]

D. Appearing for, representing or assisting another in respect to a claim before the Legislature, unless without compensation and for the benefit of a citizen. [1975, c. 621, §1 (new) .]

E. Where a Legislator or a member of his immediate family accepts or engages in employment which could impair the Legislator's judgment, or where the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded him or a member of his immediate family with intent to influence his conduct in the performance of his official duties, or where the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or losses of other employees or the general community. [1975, c. 621, §1 (new) .]

F. Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or a member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment. [1975, c. 621, §1 (new) .]

[1975, c. 621, §1 (new) .]

**2. Undue influence.** It is presumed that a conflict of interest exists where there are circumstances which involve a substantial risk of undue influence by a Legislator, including but not limited to the following cases.

A. Appearing for, representing or assisting another in a matter before a state agency or authority, unless without compensation and for the benefit of a constituent, except for

attorneys or other professional persons engaged in the conduct of their professions.

(1) Even in the excepted cases, an attorney or other professional person must refrain from references to his legislative capacity, from communications on legislative stationery and from threats or implications relating to legislative action.

[1975, c. 621, §1 (new).]

B. Representing or assisting another in the sale of goods or services to the State, a state agency or authority, unless the transaction occurs after public notice and competitive bidding. [1975, c. 621, §1 (new).]

[1975, c. 621, §1 (new).]

**3. Abuse of office or position.** It is presumed that a conflict of interest exists where a Legislator abuses his office or position, including but not limited to the following cases.

A. Where a Legislator or a member of his immediate family has a direct financial interest or an interest through a close economic association in a contract for goods or services with the State, a state agency or authority in a transaction not covered by public notice and competitive bidding or by uniform rates established by the State, a state agency, authority or other governmental entity or by a professional association or organization. [1975, c. 621, §1 (new).]

B. Granting or obtaining special privilege, exemption or preferential treatment to or for oneself or another, which privilege, exemption or treatment is not readily available to members of the general community or class to which the beneficiary belongs. [1975, c. 621, §1 (new).]

C. Use or disclosure of confidential information obtained because of office or position for the benefit of self or another. [1975, c. 621, §1 (new).]

[1975, c. 621, §1 (new).]

Section History:

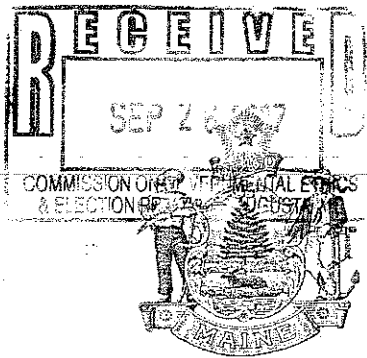
PL 1975, Ch. 621, §1 (NEW).

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STATE OF MAINE

**RIGHT TO KNOW ADVISORY COMMITTEE**

The Right to Know Advisory Committee was established to serve as a resource and advisor about Maine's Freedom of Access Laws. The Advisory Committee consists of 16 members from various constituencies, and we are working to provide training and other resources for public officials to assist them in complying with the laws governing proceedings and records.

One of the underlying premises of Maine's Freedom of Access laws is that records in the hands of public officials and agencies are public records to which the public has a right of access, unless the law provides that certain records should be treated differently. In addition to responsibilities that assist both the public and public officials and agencies, the Advisory Committee is charged with helping the Joint Standing Committee on Judiciary review and evaluate these statutory provisions that except records from the definition of "public record". Pursuant to Title 1, sections 431 - 433, the Judiciary Committee plans to review public records exceptions in Titles 1, 2, 3, 4, 5, 6, 7, 8, 9-A and 9-B during 2008. (The list of exceptions to be reviewed is posted on our website: <http://www.maine.gov/legis/opla/righttoknow.htm>.) The Advisory Committee will be providing background information and advice to the Judiciary Committee with regard to these exceptions.

With that as background, I am writing to Constitutional Officers and Commissioners, as well as other top public officials and executives who oversee offices, departments, agencies and organizations that have been identified as custodians of records that are described by an existing public records exception. Our staff, working with the Office of the Attorney General, will be contacting the programs and agencies identified and asking for assistance. We hope to better understand the records subject to the exceptions and whether the exceptions should be continued, modified or repealed. On behalf of the Right to Know Advisory Committee, I respectfully request your cooperation and the cooperation of the individuals who deal with the records in working through these questions. We would like to receive all responses by October 19, 2007, if at all possible.

If you have questions, please do not hesitate to contact me. Advisory Committee Staff Colleen McCarthy Reid and Peggy Reinsch in the Office of Policy and Legal Analysis (287-1670), as well as Advisory Committee members Deputy Attorney General Linda Pistner and Karla Black, the Governor's Deputy Legal Counsel, are also available to answer questions and provide assistance in completing the information. The Assistant Attorneys General who work with the agencies in your department can also assist in completing this information.

Thank you in advance for your assistance and cooperation.

Sincerely,

Senator Barry J. Hobbins, Chair  
Right to Know Advisory Committee

STATUTE: 1 MRSA §1013, sub-§§2 & 3

AGENCY:

CONTACT PERSON:

CONTACT PERSON'S EMAIL ADDRESS:

### QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).
2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.
3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?
4. Does your agency recommend changes to this exception?
5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.
6. Please provide any further information that you believe is relevant to the Advisory Committee's review.